Questions Presented.

As will be seen from the several opinions of the Board of Tax Appeals and of the Circuit Court of Appeals, the case turns upon the construction of Section 162 of the Revenue Act of 1928, which is identical with the respective sections similarly numbered in the Revenue Acts of 1932, 1934 and 1936 and which in its material part is as follows:—

> "*Sec. 162. Net income.* The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> "*Sec. 162.* (*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 [n]*) any part of

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* The material part of §23 of the Revenue Act of 1928 is as follows:—

"In computing net income there shall be allowed as deductions:

* * * * * * * *

"(*n*) *Charitable and other contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

"(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

"(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

* * * * * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

> the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 [n], or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit."

The issue is whether, in computing the net income of the petitioner for 1931 as trustee under the deed of trust referred to below, the petitioner is entitled to a deduction equal to the excess of income over the sums required to pay the expenses and certain annuities either (*a*) because the trustee during the same year made contributions out of income to charitable purposes aggregating more than this excess or (*b*) because the entire excess was in view of the terms of the trust "to be used exclusively" for charitable purposes.

The Commissioner of Internal Revenue disallowed the deduction altogether (R. 10). The Board of Tax Appeals unanimously allowed a deduction to the extent of $2,000.57; subject to the dissent of four members the remainder of the sum in controversy was held non-deductible (R. 65-66). Upon cross-petitions for review the majority of the Circuit Court of Appeals held that no deduction whatever was allowable, whereas the third member of the court held that the deduction claimed by the taxpayer should be allowed. The conclusion of the majority was based mainly on the theory that a payment for charitable purposes may not be regarded as having been made "pursuant to the terms" of a trust instrument within the meaning of §162 (a) unless the instrument imperatively requires the trustee to make such contribution, so that, if a contri-

1931 (R. 26). The accumulated income on hand on January 1, 1931, was $187,999.43 (R. 60).

The gross income for the year 1931, exclusive of gains, was found by the Board of Tax Appeals to have been $114,417.36 (R. 60). The Board found that in the same year the trust received from the sale of securities income of $60,901.82 (R. 60). The gross income of the trust for 1931 therefore amounted in all to $175,319.18, whereas the total of the annuities distributed or distributable in that year was $22,900 (R. 27, 61). Deducting from this total $22,350 (which was the amount actually paid out during 1931 on account of the annuities) and $11,029.79 on account of expenses there remained a balance of $141,939.39 available for charities (R. 23, 60).

During the year 1931 the trustee paid to various institutions (each of which was admittedly charitable within the meaning of §162 [a] of the Revenue Act of 1928) a total of $190,000, all of these payments being shown in the books of the trust as payments out of income (R. 26).

The cost of purchasing annuities for all of the annuitants of 1931, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33 (R. 27, 61).

The petitioner filed a fiduciary return for 1931 showing income apportioned to the annuitants and to itself (R. 23). It also filed an individual return for the same year in which it claimed as deductions on account of sums set aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains (R. 23). The Commissioner disallowed all these deductions (R. 24). The sole reason assigned by the Commissioner for the disallowance was that "it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity" (R. 12).

At the hearing before the Board of Tax Appeals, as is apparent from the several opinions, it was not contended by the Commissioner that the payments in question were not made "pursuant to the terms of the . . . deed creating the trust" within the meaning of §162 (a) of the Revenue Act of 1928 and the hearing proceeded on the footing that they were so made. The question considered was whether it was necessary for the trustee, in order to enjoy the benefit of the deduction, to show that the payments were made out of income received during the year in which they were made. The Board unanimously held that the payments in question were not made out of principal (R. 64, 66). The majority held that, in view of the possibility that accumulated income might in some future year be used for annuity payments, the income received by the trust during 1931 and not required for expenses or for the annuity payments of that year did not constitute income "to be used exclusively" for charitable purposes within the meaning of the statute and that, as regards sums actually paid to charitable institutions during 1931, it was incumbent upon the trustee to prove affirmatively that the sums in question were paid out of income received in the same year; it was said that "the deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years" (R. 64). The majority found that contributions aggregating $2,007.57 were indubitably made from the gross income of 1931 and might, therefore, be claimed as deductions, but held that as to the balance of the contributions in question (aggregating $187,999.43) the trustee had not sustained the burden of proof and that in consequence this balance was not deductible; according to the majority the Board had no way of determining how much of the payments in excess of $2,007.57 "might have been made from 1931 income and how much from prior accumulations" (R. 65). The minority, without undertaking to determine

whether the income in question was "to be used exclusively" for charitable purposes, held in substance that the deduction should be allowed on the ground that payments which are as between the trustee and the beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions and that it is immaterial whether the trustee takes the money so applied out of income actually received during the current year or takes it out of income on hand at the beginning of the year and suffers the income thereafter received to accumulate (R. 66).

Both parties petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board of Tax Appeals. The trustee assigned as error the Board's holdings "that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year" and "that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was . . . [not] to be used exclusively for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928" (R. 74). The Commissioner assigned as error the Board's failure to hold "that the amount of $2000.57 was paid out of the corpus of the estate created under the trust indenture" (R. 82); in no assignment of error was it suggested that the payments in question were not made "pursuant" to the terms of the trust instrument within the meaning of the statute. The docket numbers of the two cases in the Circuit Court of Appeals are 3145 and 3146 respectively.

At the hearing in the Circuit Court of Appeals the Commissioner put forward as his principal reliance a contention that none of the contributions, even if unquestionably made out of income received during the same year, were deductible, because the deed did not imperatively require

them to be made but gave the trustees power to make them as a matter of discretion; it was said that for this reason the payments could not be deemed to have been made "pursuant to the terms of the . . . deed creating the trust." The trustee argued that the Board of Tax Appeals rightly proceeded on the assumption that the words "pursuant to" were to be taken in their normal sense of "agreeably to" or "in accordance with"; as to the points considered by the Board the trustee reiterated in substance its former arguments.

The majority of the Circuit Court of Appeals, while overruling the Commissioner's contention that the payment of $2,000.57 above mentioned was not made from income, sustained his contention as to the meaning of the words "pursuant to" and, without passing upon the question upon which the Board of Tax Appeals had been divided, ordered the case remanded to the Board with instructions to reinstate the Commissioner's determination *in toto* (R. 87, 95). Judge Morton filed a dissenting opinion (R. 92).

Specification of Errors.

Since the point on which the case chiefly turned in the Circuit Court of Appeals was not considered by the Board of Tax Appeals and was not referred to the assignments of error filed with the respective petitions for review, a repetition of these assignments would be unprofitable. The petitioner's objections to the decision of the Circuit Court of Appeals may, however, be summarized as follows:—

1. The Circuit Court of Appeals erred in holding that the contributions made during 1931 were not deductible as payments made for charitable purposes pursuant to the terms of the trust instrument:—

(*a*) Because there is no warrant for taking the words "pursuant to the terms of the . . . deed creating the trust,"

as used in §162 (a) of the Revenue Act of 1928, to mean "as imperatively required by the terms of the deed," instead of taking these words in their normal sense of "agreeably to the terms of the deed" or "conformably to the terms of the deed";

(*b*) Because, as was held by the minority of the Board of Tax Appeals, it was not incumbent on the trustee to prove affirmatively that the funds used in making the contributions in question were the identical funds received during the taxable year.

2. The Circuit Court of Appeals further erred in not sustaining the trustee's contention that, if the contributions made during 1931 were not deductible as sums paid during the taxable year for charitable purposes "pursuant to the terms of the deed," the income received in 1931 was on any theory "to be used exclusively" for charity within the meaning of the statute, the existence of a discretionary power on the part of the trustee to draw upon accumulated income to meet future annuity payments being immaterial for this purpose.

Argument.

For a summary of the argument which follows, the petitioner begs leave to refer to subdivision 13 of the petition for certiorari (pp. 6-9, *supra*).

I.

THE CONTRIBUTIONS MADE DURING 1931 WERE DEDUCTIBLE AS PAYMENTS MADE FOR CHARITABLE PURPOSES PURSUANT TO THE TERMS OF THE TRUST INSTRUMENT.

1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong.

The importance of this question is obvious. The court will take notice of the fact that there are great numbers of trust instruments in which it is left to the discretion of the trustees to apply the income either to charitable or to non-charitable purposes as they may from time to time determine. The effect of the decision is that, although an individual who elects to make contributions to charity is allowed a deduction equal to 15 per cent. of his net income,—or even to a greater extent in certain cases; see §120 of the Revenue Act of 1928,—the income of a trust created by such an instrument is taxable without deduction even if the whole amount is contributed to charity. This result is so anomalous that it cannot in the absence of most positive language be supposed to have been the intention of Congress.

As this court has often recognized,—*e.g.*, in *Lederer* v. *Stockton*, 260 U.S. 3,—the successive revenue acts have disclosed a policy of encouraging contributions to charity by permitting such contributions to be deducted and the provisions for deductions of this class have been progres-

sively more liberal. The individual may, of course, "do what he will with his own"; in order to induce him to apply a part of his income to charity, he is allowed a deduction on account of contributions within specified limits. It is well-nigh inconceivable that, when Congress came to deal with contributions by trust estates, it should have intended to reverse this policy and to offer a trustee having power to apply income to charity no inducement whatever to do so. In any event, no such intent can be attributed to Congress when it can be read into the statute only by disregarding the normal meaning of the words and taking them in a strained and unnatural sense.

Lincoln v. *Ricketts*, 297 U.S. 373, 376.

Any such departure from the ordinary meaning of the words is peculiarly obnoxious in construing a provision intended to encourage gifts to charity.

Helvering v. *Bliss*, 293 U.S. 144, 150.

That the meaning given by the Circuit Court of Appeals to the words "pursuant to" is not that which the words normally carry is suggested by the fact that it appears never to have occurred to the Commissioner, when assessing the tax, or to the Board of Tax Appeals that they might be so construed. As already pointed out, the Commissioner's denial of the deduction was put on an entirely different ground (R. 12). While the arguments before the Board of Tax Appeals are not in the record, it is patent that no such contention was made before the Board; although the Board was sharply divided upon another aspect of the case, each of the three opinions proceeds without discussion upon the assumption that the payments in question were made "pursuant to" the terms of the deed. It is, indeed, only upon a very liberal construction of the rule

applied in *General Utilities & Operating Co.* v. *Helvering*, 269 U.S. 200, that it can be said to have been competent for the Commissioner under his general assignment of error,—"the Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations" (R. 82),—to argue that the payments were not made "pursuant to" the terms of the deed; even if the argument was open, the frame of the several assignments shows clearly that no such idea was in the mind of counsel when they were prepared. The decision of the Circuit Court of Appeals, therefore, is in effect that a construction so recondite that it did not occur to anybody prior to the argument before that court must be adopted in the face of the overwhelming probability that the intention of Congress was just the contrary.

The word "pursuant" is in such common use that the citation of authorities as to its meaning is almost superfluous. A few references, however, may be permissible. Thus in Webster's New International Dictionary (2d Ed.) p. 2018, "pursuant" is defined as follows:—

> "Acting or done in consequence of or in prosecution (of anything); hence, agreeable; conformable; following; according;—with *to* or *of*."

The definition in the New Standard Dictionary, p. 2014, is similar:—

> "In accordance; agreeably; conformably; usually with *to*."

So, in Black's Law Dictionary (3d Ed.) p. 1469, "pursuant" is defined as "conformable to, agreeable to, or in accordance with."

To settle the present question it is hardly necessary to do more than to ask what the meaning of the statute would be

if, instead of the words "pursuant to," it used one of the terms thus recognized by the dictionaries as synonymous. If, for example, the statute spoke of contributions made "agreeably" to the terms of the trust instrument, no one would imagine that a contribution authorized by the trust instrument was not made "agreeably" to its terms, even if not imperatively required. The same would be true if the statute spoke of contributions made "in accordance with" or "conformably to" the terms of the instrument.

If carried out consistently, the meaning given by the majority of the Circuit Court of Appeals to the words "pursuant to" would, indeed, lead to surprising results. For example, the Constitution of the United States (Article VI) provides that "this Constitution, and the laws of the United States which shall be made in pursuance hereof, . . . shall be the supreme law of the land." No one has ever suggested that the "laws of the United States" thus referred to are only those which it is the imperative duty of Congress to enact; it has always been assumed that "made in pursuance thereof" is equivalent to "made in the exercise of authority conferred thereby." If the decision of the Circuit Court of Appeals is right, however, this fundamental provision has only a very narrow operation; an act passed by Congress in the exercise of discretion is not "the supreme law of the land," but may be overridden by the States *ad libitum*.

The general concurrence of the courts in the views of the lexicographers appears from the decisions cited by Judge Morton in his dissenting opinion. The meaning attached by the majority of the Circuit Court of Appeals to the crucial words is, on the other hand, without support either in reason or in authority. As is pointed out in the dissenting opinion, nearly all the decisions relied upon by the majority dealt with language wholly unlike that now in question and have no bearing on the present issue.

Bowers v. *Slocum*, 20 Fed. (2d) 350, which is cited in the majority opinion, arose under §219 of the Revenue Act of 1918 (corresponding to §162 of the Revenue Act of 1928), but raised an issue entirely different from that now presented, *i.e.*, whether, if the trust instrument unequivocally directed that certain income be devoted to charity, the failure of the trustees to pay over such income or make appropriate entries in their books affected the right to claim a deduction; no question as to the exercise of a discretion given by the trust instrument was involved.

The majority of the Circuit Court of Appeals quote from the opinion of the District Court for the Western District of Kentucky in *Charles P. Moorman Home for Women* v. *United States*, 42 Fed. (2d) 257, language which may seem at first sight to support their conclusion. Upon examination, however, it will be found that in the *Moorman* case no payments to charity had actually been made during the taxable year; the income, so far as not required for the support of the life tenant, had simply been allowed to accumulate. As the judge construed the will, it was not competent for the trustee irrevocably to devote these accumulations to charity before the death of the life tenant, whose support constituted a first charge both on the income and on the principal. Thus the action of the trustee in assuming to earmark the unexpended income as appropriated to charity was merely officious. That the judge was not referring to a case like the present,—in which the trust instrument expressly gives the trustee authority to make outright gifts to charity in its discretion,—is shown by the following language (p. 260):—

> "As I view the law, if the instrument creating the trust clearly provides that the income of the trust as it accrues each taxable year shall be paid or permanently set aside to the charitable corporation, it will be exempt from taxation for each of the taxable years, notwith-

> standing the trustee may have failed or neglected either to pay it or permanently set it aside. On the other hand, if it appears from the instrument creating the trust that it was not the intention of the creator that any part of the income of the trust should be paid to or permanently set aside for the charitable corporation during the taxable year, the action of the trustee in paying or setting aside same during that year would not operate to exempt it from taxation."

It is thus patent that the language which precedes this passage and which is quoted by the majority of the Circuit Court of Appeals (R. 89) simply means that a payment may not be deemed to have been made "pursuant" to the trust instrument if not contemplated by the instrument, but made by the trustee *suo motu;* in 4 Paul and Mertens on Federal Income Taxation, § 34.60, it is so interpreted. It is hardly necessary, moreover, to suggest that, even if not thus susceptible of ready explanation, the opinion of a single district judge would be a slender foundation upon which to rest a decision which is right in the teeth of all the other authorities; the opinion has been examined in order to show that the position of the majority in the case at bar has not even this slight support.

The case, therefore, presents an interpretation of an important federal statute contrary to all the authorities and to the manifest intention of Congress. The decision of the Circuit Court of Appeals means that the many trust estates established by instruments giving a discretionary power to apply income to charity must pay a tax on their entire income, even if every cent of it is actually and irrevocably paid over to charitable institutions during the year in which it is received. That the consequences of such a decision must be serious needs no argument. A review by this court is plainly called for.

2. The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year.

As already pointed out, the proceedings before the Board of Tax Appeals were based on the assumption that the payments in question were made "pursuant" to the terms of the trust instrument. The Board had, moreover, no difficulty in finding that these payments were made out of income. The only reason why the deduction claimed by the taxpayer was not allowed in full was because it did not appear (except as to $2,000.57) that the actual money paid to charitable institutions during 1931 was taken from income received during that year and not from income accumulated at the beginning of the year. The majority of the Board stated as follows their theory as to the decisive issue (R. 64):—

> "The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years."

This is the same as saying that whether payments to charity are allowable as deductions depends, so to speak, upon the particular pocket out of which the trustee elects to take the money actually paid over. If carried to its logical conclusion this would mean that a trustee could obtain the benefit of the deduction only if he kept the net income of each year in cash or its equivalent in a separate box or bank account and made all contributions out of that fund. The effect is to render the provision for deduction worthless

to a trust estate conducted in the ordinary way; it is patent that the practical exigencies of such an estate must often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from the income of the current year. The seriousness of this question to all trust estates is apparent.

The objections to such an ultra-literal and unreasonable interpretation of the statute are pointed out in the dissenting opinion of Board Member Smith (R. 65-66), which states the matter so clearly that little can be added. As he observes, the result is altogether out of harmony with the view expressed by this court in *Lederer* v. *Stockton*, 260 U.S. 3, *i.e.*, that the favor which Congress intended to extend to charitable gifts is not to be defeated by the mere form of the transaction. That the views of the majority are open to question further appears from the comment on the decision by Messrs. Paul and Mertens (4 Law of Federal Income Taxation, Supplement of 1936, p. 32; italics supplied):—

> "*Note 96.* In *Old Colony Trust Co., Trustee*, 33 B.T.A. 311, it is said that 'The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years,' the decision suggesting that the payments must be from the gross income of the taxable year. The trustees had power to make the payments from corpus, accumulated income or excess current earnings in any particular year. Disallowance of a deduction for a payment actually made was not refused on the ground that the provisions of the trust instrument did not require the payments to be made out of income, but for the reason that the trustees had not clearly shown what part of the payment was made from current income. Four members dissented. *There is much force in the position of the minority.*"

There is, indeed, no difficulty in taking "any part of the gross income . . . , which . . . is during the taxable year paid or permanently set aside," etc., as meaning that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. It must be assumed that Congress in enacting §162 (a) took notice of the manner in which trust estates are commonly administered and did not intend to make the exemption depend upon the trustee's making a segregation which would never be made in ordinary accounting practice. It is likewise to be assumed that Congress had no purpose to establish a purely arbitrary distinction and to cause the right to claim the deduction to hinge on a mere accidental circumstance having no relation to a policy which has run through the income tax laws from the beginning.

It is further to be noted that the deduction allowed to individuals on account of contributions to charity is in no way conditioned upon the source from which the contributions are taken. It is recited in §162 (a) that "there shall be allowed as a deduction (*in lieu of the deduction for charitable, etc., contributions authorized by section 23* [*n*]) any part of the gross income, *without limitation,*" etc. (Italics supplied.) It would surely be a strange thing to allow to estates and trusts "in lieu" of the limited deduction allowed individuals a deduction which purported to be "without limitation," but which was so restricted in another particular as often to be worthless.

The petitioner submits that this question, like that arising with respect to the construction of the words "pursuant to," is of importance to all trustees and calls for determination by the court of last resort.

II.

IF THE PAYMENTS IN QUESTION ARE DISREGARDED, THE RECEIPTS OF THE TRUST FOR 1931 (ABOVE THE AMOUNTS REQUIRED TO PAY ANNUITIES AND EXPENSES) CONSTITUTED INCOME "TO BE USED EXCLUSIVELY" FOR CHARITABLE PURPOSES.

There can be no pretence that the income of 1931, after deducting the sums necessary to meet the annuities and expenses of that year, was applied through any act of the trustee to non-charitable purposes. If it be assumed for the sake of argument that, either for the reason given by the majority of the Board of Tax Appeals or for that assigned by the majority of the Circuit Court of Appeals, the payments are not allowable as deductions, the case must stand as if those payments had not been made and as if the sums in question had been retained by the trustee. On this assumption the question is whether these sums constituted income "to be used exclusively" for charitable purposes within the meaning of the statute.

It will doubtless be conceded by the respondent that, if under the terms of the trust instrument it was necessary that these sums be eventually applied to charity, the fact that they were not paid over during the taxable year would not be material. As the case actually stands, the entire trust property,—both principal and income,—is charged with a charitable use, subject to the condition subsequent that either principal or accumulated income may be used in the discretion of the trustee to meet annuity payments. In this aspect, therefore, the case raises a question as to which the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Second Circuit are in conflict. In the Second Circuit it has been held that, if the terms of the trust instrument are such that the income, as received, is charged with a charitable use, the

existence of a condition subsequent whereby the sums in question may possibly be diverted to a non-charitable purpose does not prevent such sums from constituting income "to be used exclusively" for charitable purposes within the meaning of the statute.

Hartford-Connecticut Trust Co. v. *Eaton*, 36 Fed. (2d) 710, affirming 29 Fed. (2d) 840.

This decision has been followed by the District Court for the District of Connecticut in *Hartford-Connecticut Trust Co.* v. *Eaton*, 41 Fed. (2d) 69.

In the First Circuit the position has been taken in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue*, 66 Fed. (2d) 179, and again in the case at bar that, even if a charitable use attaches to the income when received, it cannot be regarded as constituting income "to be used exclusively" for charitable purposes so long as there remains a possibility that it may be diverted to other purposes through the operation of a condition subsequent. That this position was not assumed without appreciation of its inconsistency with that adopted in the Second Circuit appears from the express language of the opinion in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue*, *supra* (at p. 184):—

> "We think the words 'or to be used' have no such significance as was given them in *Hartford-Connecticut Trust Co.* v. *Eaton* [36 Fed. (2d) 710]."

As showing the unsoundness of the view taken in the First Circuit, the petitioner begs leave to quote from the opinion of Board Member Smith in the present case (R. 66):—

> "It is further to be noted that the entire income of the trust fund was to be paid to charitable and other organizations referred to in section 23 (n) after the

payment of expenses and annuities. If the trust fund is required to pay the tax determined by the board in this case, the payment impinges upon the amount which would otherwise go to charities. In my opinion this was never contemplated by Congress."

It is further to be observed that, in the case at bar, the doctrine enunciated in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue* has been carried to an extravagant length. The capital value of the annuities in 1931 represented only a small fraction of the entire trust property. The gross income for that year,—which was, of course, at the bottom of the depression,—was almost eight times the total of the annuity payments. Most of the annuitants were persons of advanced age, so that the aggregate of these payments tended steadily to diminish (R. 27). The possibility that the current income would so fall off as to make it necessary to draw either on the principal or on accrued income to keep up the annuity payments was thus so slight as to be purely theoretical. This court has repeatedly held that, even if a real prospect of diversion would be material in determining the incidence of a tax, a possibility as remote as this must be disregarded.

Ithaca Trust Co. v. *United States*, 279 U.S. 151.
Cochran v. *United States*, 254 U.S. 387.
Simpson v. *United States*, 252 U.S. 547.
Henry v. *United States*, 251 U.S. 393.

The respective Circuit Courts of Appeals for the Second Circuit and for the Fifth Circuit have applied this principle to facts much like those now presented.

Humphrey v. *Millard*, 79 Fed. (2d) 107, affirming 8 Fed. Supp. 784.
First National Bank of Birmingham v. *Snead*, 24 Fed. (2d) 186.

The case at bar thus presents an issue upon which the decisions in different circuits are in conflict and upon which the decision sought to be reviewed is inconsistent with the opinions of this court. Such a decision peculiarly demands examination.

FRANCIS V. BARSTOW.
HAROLD S. DAVIS.